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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-714

JUAN PEDRO FARINAS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 28, 1971.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Tenney, D.J.) dismissing the first indictment against petitioner is reported at 299 F.Supp. 852 (1969) and is set out in the Appendix, *infra* at pp. 1a[1] through 6a. The opinion of the United States District Court for the Southern District of New York (Cooper, D.J.) denying petitioner's motion to dismiss the second indictment is reported at 308 F.Supp. 459 (1969) and is set out in the Appendix, *infra* at pp. 10a

[1] All references "a" refer to the Appendix to this petition.

through 24a. The opinion of the trial court (Pollack, D.J.) denying petitioner's post-trial motion for a judgment of acquittal is unreported and is set out in the Appendix at 25a to 26a. The opinion of the Court of Appeals affirming petitioner's conviction is unreported and is set out in the Appendix, *infra* at 27a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 28, 1971. On October 28, 1971, Mr. Justice Marshall extended the time in which to file a petition for certiorari to November 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statement of the Case

On July 21, 1968, petitioner Juan Pedro Farinas, then 21 years of age and a member of the Progressive Labor Party, was ordered by his local Selective Service Board to report for induction into the armed forces at the Armed Forces Examining and Entrance Station (hereinafter AFEES), 39 Whitehall Street in New York City, by 7:00 A.M. on August 13, 1968 (29a). He appeared at the AFEES on the morning designated and prior to the appointed hour took part in a peaceful demonstration protesting the war and the draft in front of the induction center (29a). At approximately 7:15 A.M. Farinas entered the induction center and unlike the other inductees, was escorted to Room 203 of the AFEES by Captain Kenny, the AFEES Adjutant (administrative) officer, and one Master Sergeant Bereza. Because, according to Capt. Kenny,

Farinas had been the purported "object" of the demonstration, Kenny felt it was necessary to immediately counsel Farinas "for his own protection" (T. 41)[2] that if he were disruptive he would be declared uncooperative and ejected from the AFEES (T. 43). After being counseled, petitioner was permitted to enter the pre-induction processing in Room 204 with his leaflets. Capt. Kenny and Sgt. Bereza described Room 204 as an orientation room where in addition to filling out "some forms" the processees "spend a lot of time doing nothing" (T. 47, 48, 95). Upon entering Room 204, petitioner commenced distribution of his leaflets to the other processees (T. 79).

There were no published, written, or even settled rules concerning leafletting or speech-making in the AFEES. Sgt. Bereza, on his own initiative took the position that no leafletting was to be permitted, and so informed Farinas (T. 76, 77, 79, 90). Again on his own initiative, however, Bereza decided to make "an exception" and allow the petitioner to retain custody of his leaflets (T. 78, 30a). This exception was limited in scope to possession apparently, because—as discussed immediately below—it was the peaceful distribution of leaflets which touched off the clash between Farinas and Bereza from which the instant case flows.

Capt. Kenny, Sgt. Bereza's superior, took a very different posture in the framing of his personal rules. Leafletting and speech-making were not *per se* prohibited if they were not "disruptive" (T. 38, 53; Grand Jury Minutes 5). In his testimony before the Grand Jury, Kenny gave a more precise indication of where he drew the line:

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[2] References "T" refer to the trial transcript which is part of the record.

> The passing out of the literature itself would not constitute us calling him an uncooperative registrant, but when he began making the speeches and trying to persuade other registrants to follow in his path, this is when we would classify him as uncooperative (Grand Jury Minutes 5).

Upon discovering that petitioner had begun to leaflet, Sgt. Bereza requested him to return to Room 203 which petitioner preliminarily declined to do. Thereupon, Sgt. Bereza became somewhat emotional, attempted to grab petitioner's leaflets, failed, and then called for Capt. Kenny (T. 80, 81, 23). At that point petitioner returned to Room 203 from Room 204 where he was "counseled" by Capt. Kenny (T. 24, 82, 161). Thereafter petitioner returned to the induction processing Room 204 with his leaflets (T. 27, 31a). A short time later, possibly ten minutes, Capt. Kenny stated that he was again summoned to the second floor where he encountered Farinas, this time in Room 206, addressing some of the other processees on the immorality of U.S. military involvement in Vietnam (T. 27). (Sgt. Bereza was not present (T. 82).) At this point Capt. Kenny declared Farinas to be "uncooperative" and escorted him from the AFEES (T. 27, 65).

At no time did the government's witnesses contend that petitioner was violent (T. 70-71, 105). At no time did petitioner state to Capt. Kenny or Sgt. Bereza that he intended to refuse to submit to induction (T. 68, 107). Indeed, the evidence adduced at trial revealed beyond peradventure of a doubt that it was petitioner's intention to submit to induction in accordance with the Progressive Labor Party doctrine (T. 145, 148, 150, 151, 152, 156, 164,

177, 179, 181, 183). At no time was petitioner requested by Capt. Kenny to execute a statement as a noncooperator as provided for in AR 601-270, Sec. 3-31(c) (2) (T. 73).

Proceedings Below

Subsequently, a grand jury, in the Fall of 1968, returned an indictment against petitioner (2a). The crime charged therein cryptically alleged that petitioner had merely failed "to obey the orders of the representatives of the Armed Forces" while at the AFEES. No mention was made of a failure to report or a refusal to submit to induction. The indictment was subsequently dismissed for vagueness. See *United States* v. *Farinas*, 299 F. Supp. 852 (S.D. N.Y. 1969) (1a).

On May 29, 1969, the instant indictment was returned (7a-9a). It consisted of five counts. Counts I, II, and III were alleged violations of 32 C.F.R. 1632.14(b)(4), which proscribes the failure of a prospective inductee "to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished." Count I charged that the petitioner "failed to cease and desist distributing leaflets to other registrants when ordered to do so"; Count II that "failed to cease and desist making speeches to other registrants when ordered to do so"; and Count III, that he "failed to cease and desist engaging in boisterous and unruly behavior when ordered to do so". These three counts were consolidated as one count at the close of the government's case.

Petitioner's prosecution is the only known instance of proceedings under 32 C.F.R. 1632.14(b)(4).

Count IV charged the petitioner with failing, and neglecting and refusing "to report for and submit to induction into the Armed Forces of the United States."

Count V reiterated the conduct specified in Counts I, II, and III, charging that it constituted hindrance and interference with the induction process by "force and violence and otherwise" under 32 C.F.R. 1632.14(b)(4).

Questions Presented for Review

1. Whether 32 C.F.R. 1632.14(b)(4)—which is made the basis of a criminal prosecution for the first time in this case—contravenes the guarantees of free expression in the First Amendment in that it is overly broad and vague.

2. Whether 32 C.F.R. 1632.14(b)(4), as the basis of a criminal sanction, is within the scope of a valid delegation and sub-delegation of congressional authority, and specifically,

   a. Whether Congress could constitutionally effectuate such a delegation and sub-delegation; and

   b. Whether Congress intended to effectuate such a delegation and sub-delegation.

3. Whether Count IV of the indictment was fatally duplicitous; or alternatively, whether there was a fatal variance between indictment and proof?

Constitutional Provisions, Statutes and Regulations Involved

This case involves the First and Fifth Amendments to the Constitution of the United States; the Military Selective Service Act of 1967 (50 U.S.C. App. §451, et seq.); Title 32 C.F.R. §1632.14 and Army Regulation (AR) 601-270.

REASONS FOR GRANTING THE WRIT

I.

This case involves the first reported prosecution under 32 C.F.R. §1632.14(b)(4); that provision is overly broad and vague and thereby violates the guarantees of free expression in the First Amendment.

Section 1632.14(b)(4) requires a prospective inductee "to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished." As stated by the Court below, the regulation is given "teeth" by 50 U.S.C. App. §462(a), which makes the knowing failure to carry out "any of the provisions of this title . . . or the rules or regulations made or directions given thereunder" a felony.

The regulation as applied here permitted two low-ranking Army officials, acting without guide, standard or precedent, to reach independent, ad hoc, and inconsistent judgments as to the permissibility of leaflet distribution and oral commentary by a civilian processee. Such a circumstance is patently inconsistent with the constitutional norm ex-

pressed by this Court in *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-51 (1969):

> "A law submitting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective or definite standards to guide the licensing authority is unconstitutional."

See also, e.g., *Cohen* v. *California*, —— U.S. ——, 29 L.Ed. 2d 284 (1971); *Coates* v. *Cincinnati*, —— U.S. ——, 29 L.Ed. 2d 214 (1971); *Thornhill* v. *Alabama*, 310 U.S. 88 (1939); *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *United States* v. *L. Cohen Grocery*, 255 U.S. 81 (1921).

Section 1632.14(b)(4) contains no standards, and provides no guidance to the Armed Forces representatives as to what conduct may be permitted or proscribed in the induction center. Specifically, it provides no limitation whatsoever upon the degree of restraint upon speech and speech related activities which the Armed Forces representatives may choose to apply.

The Court of Appeals recognized that ". . . this regulation . . . might raise serious constitutional questions, cf. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1965),"[3] but went on to conclude that:

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[3] See p. 33a. A recognition of the potential constitutional abuses of an unrestrained authority to restrain speech and speech related activities runs through the opinions of all the courts which

> ". . . when viewed [however] in context as applied it appears to be reasonably essential to the performance of a basic governmental function, and sufficiently narrow and limited in scope to constitute a permissible restriction upon the exercise of First Amendment rights [citing *Cox* v. *Louisiana,* 379 U.S. 536, 559 (1965)] . . . the regulation by its terms applies only to registrants who have reported to the induction center, and it may not be employed to suppress speech beyond what is required by the exigencies of the induction process. *Callison* v. *United States,* 413 F.2d 133 (9th Cir. 1969)" (34a).

This conclusion was apparently based upon two propositions. The first is an adoption of the saving gloss put on

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have reviewed the petitioner's claims. Judge Tenney, who dismissed the first indictment observed:

> "This Court can conceive of certain orders, unrelated to the induction process, which a civilian would not under law be necessarily required to follow." *United States* v. *Farinas,* 299 F. Supp. 852, 854 (S.D.N.Y. 1969).

And Judge Cooper, who nevertheless sustained the second indictment, acknowledged that:

> "This regulation requiring that an inductee obey all orders given him by appropriate personnel at an induction center appears at first blush to vest in such military officials untrammeled authority and discretion. From the face of the indictment itself, alleging violation of specific orders directed to defendant to cease making speeches and distributing leaflets, it is clear that *this regulation can restrict an inductee's freedom of speech.*" *United States* v. *Farinas,* 308 F. Supp. 459, 463 (S.D.N.Y. 1969) (emphasis added).

Judge Cooper also candidly noted that

> "the narrow application of this regulation might not by itself validate its delegation of 'licensing' power if the discretion vested in those authorized to give orders were unrestrained." *Id.* at 464. Cf. p. 8, *supra.*

the regulation by Judge Cooper in his opinion denying petitioner's pre-trial motions to dismiss the indictment:

> "[T]o be legal and enforceable, orders given pursuant to the authority of 32 C.F.R. §1632.14(b)(4) must relate to the induction process."

United States v. *Farinas*, 308 F. Supp. 459, 464 (S.D.N.Y. 1969). The second is the fact that the regulation is limited "in time . . . and place" to the induction center at the time of the induction process (35a).

But to say that orders under §1632.14(b)(4) must be limited to those which "relate to the induction process" is to leave open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *United States* v. *L. Cohen Grocery Co., supra*, 255 U.S. at 89. The government itself has conceded that orders under the regulation "could be infinite in variety."[4] The prohibition of all speech, including conversation, within the induction center would "relate to the induction process"; so indeed would the prohibition of all speech which contained statements of opposition to the war, or to the military establishment.

The Court of Appeals below was satisfied that it had placed a sufficiently limited construction upon the regulation:

> "The objective of the regulation is clear: to authorize the issuance of orders that would facilitate the uninterrupted processing of inductees. By its own terms

[4] This statement is from the government's memorandum in opposition to petitioner's motion to dismiss the first indictment, at page 3.

and by reason of its place in a specific regulatory scheme, the regulation must be construed narrowly and constricted in its applicability by limitations as to person, time, and place that will avoid unconstitutionality. *Scales* v. *United States,* 367 U.S. 203 (1961); *United States* v. *Spock,* 416 F.2d 165, 173 n. 20 (1st Cir. 1969). We therefore find no constitutional infirmity. *Eisner* v. *Stamford Board of Education,* 440 F.2d 803 (2nd Cir., 1971)" (35a).

But in reality, the restrictions recognized by the Court below amount to very little more than a recognition that the orders under §1632.14(b)(4) are necessarily limited in time, place and substance to the conduct of a processee at the induction center. In effect, the Court's conclusion that this saves the regulation constitutes a judgment that the power to restrain the speech of processees within a place of induction, however broad and standardless, is constitutional. This in turn is the functional equivalent of a judgment that all speech guarantees are suspended at the time and place of military induction.

Yet there is nothing about the induction process which supports the view that its orderly progression can be maintained only by investing the Armed Forces representatives who conduct it with unfettered authority to restrain speech. That however is exactly what §1632.14(b)(4) does, even as "restricted" by the limitations of the Court below.[5]

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[5] It should be noted that neither the indictment nor the trial judge's instructions limited the offenses under §1632.14 to any interference with the induction process. This element of interference, in fact, is what distinguishes Counts I, II & III from Count V. Petitioner raised this issue below and preserves it should certiorari be granted but does not now brief the question fully. Similarly we contend, as was argued below, that the evidence was insufficient to sustain convictions on Counts I-III and V; and that certain evidentiary rulings require reversal.

II.

This novel prosecution is based upon a broad and standardless delegation and sub-delegation of congressional authority, such a delegation is constitutionally impermissible and was not intended by Congress.

Two propositions underly the arguments in this section. First, where, as here,* First Amendment rights are involved, the issue of deletion becomes one of special concern, and courts "must construe narrowly all delegated powers that curtail or dilute" such rights. *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958). Second, it is likewise axiomatic that where Congress has delegated the task of framing regulations to an administrative body and makes a violation of those regulations criminal, such regulations must be framed with considerable precision. See, *United States* v. *Grimaud*, 220 U.S. 506, 522 (1911); *M. Kraus & Bros.* v. *United States*, 327 U.S. 614, 621-22 (1946); *Porter* v. *Federated Meat Corp.*, 157 F.2d 276 (2nd Cir. 1946); *United States* v. *Blumberg*, 258 F.Supp. 885 (D. Del. 1966); *United States* v. *A. & P. Trucking Corp.*, 113 F.Supp. 349 (D.N.J. 1953); *United States* v. *Illinois Central R.R. Co.*, 269 F.Supp. 236 (W.D. Tenn. 1967). In the instant case, the delegation and sub-delegation of congressional authority make speech and speech-related activities criminal.

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* See generally, Kaufman, *The Medium, The Message and The First Amendment*, 35 N.Y.U.L. Rev. 761, 776 (1970):

> "... hand distribution of literature [is] a means of communication involving slightly more activity than merely speaking and one which traditionally has been afforded a large measure of protection under the First Amendment."

E.g., see *Wolin* v. *Port Authority*, 392 F.2d 83 (2nd Cir. 1968) cert. denied 393 U.S. 940 (1969); *Unemployed Workers* v. *Hackett*, 40 U.S.L.W. 2273 (D.R.I. 1971).

A. *The Impermissible Delegation of the Legislative Power.*

§12(a) of the Act imposes severe criminal sanctions on any registrant "who in any manner shall knowingly fail or neglect or refuse to perform any duty" required under the Act itself, or the rules, regulations or directions issued thereunder.

While it is acknowledged that the Act empowers the President to prescribe the necessary rules and regulations to carry out its provisions,

> "The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

See also *Kent v. Dulles*, 357 U.S. 116 (1958); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Zemel v. Rusk*, 381 U.S. 1, 22 (1965) (Black, J., dissenting).

It is, of course, also acknowledged that Congress has the power, subject to constitutional limitations, to make it a crime for persons to violate a duty imposed by statute. However, Congress may not constitutionally exercise the power to make it a crime to "fail or neglect or refuse to perform *any* duty required"[*] by the Act, or the rules, regulations and directions issued thereunder, without establishing guide lines in the form of legislative standards for the exercise of this delegation of authority. See *Lambert v. California*, 355 U.S. 225 (1957); *Smith v. California*, 361 U.S. 147 (1959).

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[*] 50 U.S.C. App. §460(b)(1).

[*] Emphasis added.

Section 12(a) of the Act is utterly bereft of any standards by which Congress has prescribed limits to the delegated authority. Cf. *Gutknecht* v. *United States*, 396 U.S. 295, 306 (1970); *United States* v. *Eisdorfer*, 299 F. Supp. 975 (E.D.N.Y. 1969), appeal dismissed 396 U.S. 1066 (1970).

Indeed, the impermissible breadth and scope of the delegation approaches "inherently boundless" proportions where the statute refers not only to rules and regulations, but to unspecified "directions" which presumably can be issued by any one of the thousands of local draft boards throughout the United States. *Cohen* v. *California*, —— U.S. ——, 29 L. Ed. 2d 284, 294 (1971).

As Judge Dooling has accurately observed with respect to the duties embodied in the Selective Service Regulations:

> "The registrant's duties embrace not only the primary ones of registration, submission to specific directions to report (as for examination), and submission to induction, but also secondary duties that in some instances do no more than facilitate administration of the system and in others are more evidently in some form indispensable to effective administration of the law. Some of the duties are expressed in such terms that literal interpretation of them is impossible, and they invite judgmatical approximations of compliance that could easily be wrong." *United States* v. *Eisdorfer*, *supra* at 299 F. Supp. 988.

Judge Cooper, in deciding petitioner's pre-trial motion to dismiss the indictment acknowledged that the statute permits a "concededly broad" standard of delegation to the

administrator, but held that the standard set forth in the statute allowing the administrator to "carry out the provisions" of the Act "to be constitutionally adequate." *United States* v. *Farinas*, 308 F. Supp. 450, 463 (S.D.N.Y. 1969). The court below upheld this contention. *United States* v. *Farinas* (35a).

One looks in vain, however, for any standards which the administrator is to apply. For example, focusing upon 32 C.F.R. §1632.14, a registrant is required to obey the orders of his local board, a clerk of his local board, a leader or assistant leader appointed for the group of inductees to which he is assigned, as well as any and all representatives of the Armed Forces who happen to be assigned to his induction center. This is, as Mr. Justice Cardozo put it, "delegation running riot." *Schecter Poultry Corp.* v. *United States*, 295 U.S. 495, 553 (1935) (concurring opinion).

To compound the constitutional infirmity, present here is also a sub-delegation from the Selective Service System to the military—i.e., those Armed Forces personnel who happen to be stationed at induction centers. Needless to say, there are simply no standards set forth for the exercise of the sub-delegate's authority. Cf. *Washington* v. *Robenge*, 278 U.S. 116 (1928).

Could Congress delegate to a Sergeant Bereza the authority to deny distribution of *all* leaflets because he viewed such practice with disfavor? (T. 76, 77, 79, 90). Or, are we to look to Captain Kenny, who was a bit more tolerant though confused in even his own formulation of a standard to apply (T. 38, 53, G.J.M. 5). As this Court has recognized, in *Cohen, supra* ". . . governmental officials cannot make principled distinctions in this area." *Id.* at 294. See also *Coates* v. *Cincinnati*, —— U.S. ——, 29 L.Ed.2d 214, 217-18 (1971).

B. *Congress Never Intended That a Violation of 32 C.F.R. §1632.14(b)(4) Be Made Criminal.*

§12(a) of the Act does not state that it is a crime to disobey the orders of the representative of the Armed Forces while at the induction center. Instead, §12(a) contains a general statement of criminality which includes one who knowingly fails, refuses or neglects "to perform any duty . . . required of him under or in the execution of this title."

The question then becomes whether Congress intended that the violation of any and every duty imposed by the Regulations should be made criminal. Such constructional adventurism is neither judicially condoned nor should be made common when construing criminal statutes. *United States* v. *Boston & Maine Railroad*, 380 U.S. 157, 160 (1965). See also, *Smith* v. *United States*, 360 U.S. 1, 9 (1959); *Commissioner of Internal Revenue* v. *Acker*, 361 U.S. 87, 91 (1959).

There is little, if any, legislative history to assist the Court in ascertaining the intention of Congress. On the other hand, research fails to reveal the existence of a single instance, other than the case at bar, where a registrant was prosecuted for violation of 32 C.F.R. §1632.14(b)(4)—itself an indication that a violation of this regulation was not intended to be made criminal.[9] Compare the regulatory basis for the prosecutions in *Callison* v. *United States*,

[9] The failure to enforce §1632.14(b)(4) by criminal prosecution may well render it unenforceable under the doctrine of desuetude recognized by the Supreme Court in *Poe* v. *Ullman*, 367 U.S. 497 (1961). But whether or not that doctrine is directly applicable, the failure to enforce the regulation must be taken into consideration in considering the ambit of its intended operation.

413 F.2d 133 (9th Cir. 1969) and *United States* v. *Meyers*, 410 F.2d 693 (2nd Cir.), cert. den., 396 U.S. 835 (1969).[10]

It would seem that disobeying the orders of representatives of the Armed Forces while at the induction center is in the same category of non-criminal behavior as disobeying the "instructions of the leader or assistant leaders appointed for the group being forwarded for induction", a like duty imposed upon a registrant by the same regulation 32 C.F.R. §1632.14(b)(2).[11]

It is hardly credible that Congress intended to make the disobeyal of an order of a leader" (a fellow inductee) the predicate for a criminal prosecution and imprisonment, if convicted, for a term of five years.

Similarly, §1632.14(b)(6) of the regulations imposes a duty upon the registrant, in the event that he is found not qualified for induction, "to follow the instructions of the representatives of the Armed Forces as to the manner in which he will be transported on his return trip to the local board." The Government can hardly assert with seriousness that a registrant so situated who digressed from this route would be subject to prosecution under §12(a) of the Act for violating his prescribed duty?

And what of that portion of the same regulation which imposes a duty upon the registrant "to follow the instructions of a member or clerk of the local board as to the man-

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[10] 32 C.F.R. 1632.14(b)(5).

[11] §1632.15 of the regulations directs that when the registrants who are to be forwarded for induction have assembled, the local board shall *appoint from such registrants* a leader and assistant leader who "shall have such authority as is necessary to deliver the group to the place of induction."

ner in which he shall be transported to the location where his induction will be accomplished"? §1632.14(b)(1). It is difficult to imagine the Government attempting to support a prosecution under §12(a) for violation of a duty where the registrant happened to stray from the course to the induction center designated by a clerk of his local board.

The regulations are replete with duties imposed upon a registrant, some of which, as Judge Dooling has observed,

> "are expressed in such terms that literal interpretation of them is impossible, and . . . invite judgmatical approximations of compliance that could easily be wrong." *United States* v. *Eisdorfer, supra* at 988.

Under well settled principles of construction, it cannot be said that Congress ever intended that the disobeyal by a civilian of orders of the sort in question here were to be made criminal. The Government cannot expand the Act in the manner which it now seeks to do—to create a crime based on acts which Congress never intended to be made criminal, and which the Government itself has never before sought to make criminal.

III.

The decision of the Court below, sustaining petitioner's conviction for failing and neglecting "to report for and submit to induction," is in conflict with decisions of the Third and Ninth Circuit Courts of Appeal.

The crime charged against petitioner in Count IV (8a-9a) was that of failing and neglecting to comply with an order of his local board "to report for and submit to induction" (9a).

The record is plain, that petitioner did "report" for induction and that he was not given the opportunity to "submit" to induction as prescribed by Army Regulations. The issue in dispute, therefore, is whether his conviction for failing "to report for and submit to induction" can stand.[12]

The procedure regulating the induction process is set forth in precise detail in Army Regulation 601-270.[13] Paragraph 37(a) provides that "all registrants" will be assem-

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[12] Prior to trial, petitioner moved to quash the indictment for duplicity but the motion was denied as premature. 308 F. Supp. 459, 467 (S.D.N.Y. 1969). The issue was extensively briefed on appeal, the principal contention being that the trial of petitioner on Count IV and Judge Pollack's charge to the jury on that Count were in patent violation of the holdings of this Court in *Stirone* v. *United States*, 361 U.S. 212 (1959) and *Russel* v. *United States*, 369 U.S. 749 (1963). Petitioner preserves this claim should certiorari be granted, but does not now argue it, except to note that the decision below as to Count IV is also in direct conflict with the decision of the Fifth Circuit in *Schutz* v. *United States*, 422 F.2d 991 (5th Cir., 1970).

[13] Induction centers are under the control and operation of the armed forces. Selective Service Regs. 1602.7, 1632.14(b), 1632.15 (e).

bled and informed "of the imminence of induction, quoting the following: . . . ." The quote which follows informs the group that "they will take one step forward as your name and service are called and such step will constitute your induction into the Armed Forces indicated." Paragraph 37(a)(2) provides for the quiet and courteous removal of any registrant who fails to take the requisite step forward.

Paragraph 40(c) sets out the procedure to be followed with registrants who refuse to submit to induction and who have been removed from the group under paragraph 37(a)(2). Any such registrant is to be informed that his refusal to submit is a felony subject to 5 years imprisonment and a $10,000 fine, or both; he will again be informed of the imminence of induction by the language specified in paragraph 37(a)(1) and given a second chance to take one step forward. If he again refuses, the registrant will be requested to sign a statement saying "I refuse to be inducted into the Armed Forces of the United States." He is then free to go (though in some federal judicial districts a registrant who refuses to submit is arrested immediately).

This procedure was not followed in petitioner's case. Rather, after properly reporting for induction, he notified the military personnel at the induction center that "he had no intentions to process in any way, such as physical examination or mental" (T 23). Though informed of the penalties for being uncooperative, petitioner was not given the opportunity to refuse to submit to induction under the explicit procedures prescribed under AR 601-270.

To the extent that the Court below discussed this issue, it totally misread certain language from *Billings* v. *Trues-*

dell, 321 U.S. 542, 557 (1944).[14] The Court of Appeals' opinion recognizes that petitioner was charged in the conjunctive, and though it acknowledges that petitioner did report, concludes that an order of a draft board to report for induction also encompasses an order to *submit* to induction. That, with deference, rather begs the question because, not having been given the opportunity to submit under AR 601-270, petitioner cannot be said to have disobeyed the draft board's order which also encompasses an order to *submit* to induction.

The decision of the Second Circuit is thus in conflict with the decision of the Ninth Circuit in *Chernekoff* v. *United States,* 219 F.2d 721 (1955) and the Third Circuit in *United States* v. *Kroll,* 402 F.2d 221 (3rd Cir. 1968), *cert. den.* —— U.S. —— (1969). In *Chernekoff* the defendant was not given the opportunity to step forward under the predecessor (but substantially equivalent) regulation to AR 601-270,[15] because "he had said he would not if asked to do so step forward and become inducted into the Armed Forces." 219 F.2d at 725. The Ninth Circuit, in reversing the conviction, said:

> "It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulations to seriously reflect and to let actions speak louder than words . . . . [I]t is highly important that the moment a selectee becomes subject to military authority be

[14] The *Billings* dictum holds only that failure to report for induction is equally as much a crime as refusing to submit to induction—*not that they are the same crime.*

[15] The predecessor Army Regulation, 615-180-1, is set out at 219 F.2d at 724, n. 12.

marked with certainty. It is also important that the moment he becomes liable for civil prosecution be marked with certainty. The special regulation fulfills such a need." *Ibid. Accord, Kroll, supra* at 402 F.2d 222.

This conflict between *Chernekoff, Kroll* and the case at bar, should be settled by this Court in order to make perfectly clear what the respective obligations of registrants and armed forces personnel are at the induction center. We urge, of course, that the *Chernekoff-Kroll* rule is the sound rule for it eliminates any ambiguity about the intentions of a prospective draftee.

POINT IV

The conviction under Count V should be reversed because 50 U.S.C. App. §462(a) and 32 C.F.R. §1632.-14(b)(4) were unconstitutionally utilized to exclude the exercise of First Amendment activities.

Clearly, the activities of the petitioner as set forth in the fifth count of the indictment (9a), speaking and distributing leaflets, are classic expressions of First Amendment rights.[16]

As if it were anticipating the later expansion by this Court of First Amendment rights in the context of debilitating criminal prosecutions, the Court of Appeals in

[16] The added allegation that petitioner engaged in "boisterous and unruly behavior" does not denigrate from the profound First Amendment considerations present here. It is difficult to conceive that Congress ever intended such conduct in and of itself to be the predicate for a possible term of imprisonment of up to five years. More likely than not, such conduct is a misdescriptive characterization of the speech making and distribution of leaflets.

Bagley v. *United States*, 136 F.2d 567 (5th Cir. 1943), held that the limiting term "force and violence" contained in 50 U.S.C. App. §462(a),

> " . . . was not put there by accident or inadvertence. It was carefully chosen by Congress when this country was not at war but only preparing for its eventuality in order to insure the fullest preservation of expression of opinion that the act would not be the instrument of partisan prosecution to suppress that freedom, and that prosecutions under it would be brought only where there was forcible rather than ideological opposition to the draft." 136 F.2d at 569.

The exercise of such rights, even in an induction center, cannot be made the very foundation of a prosecution for the offense charged in this indictment. As the Court of Appeals observed in *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969), speech cannot be forbidden "merely because the natural consequences might be to interfere with [the Government], or even lead to unlawful action." *Spock, supra*, citing *Bond* v. *Floyd*, 385 U.S. 116 (1966). Accord, *Cohen* v. *California*, —— U.S. ——, 29 L.Ed.2d 284, 292 (1971):

> " . . . so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First Amendment be punished for asserting the evident position on the inutility or immorality of the draft . . . ".[17]

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[17] "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969)." *Cohen, supra*, at 29 L.Ed.2d 292.

While it may be conceded that Congress has the power to authorize the use of criminal sanctions against one who forcibly hinders or interferes with the Act, nevertheless, the First Amendment denies it the power to do so in a case such as this where the government's witnesses themselves admitted that petitioner was never violent (T. 70-71, 105) and where the activities petitioner engaged in took place in a room of the induction center which the same government witnesses admitted that other processees spent "a lot of time doing nothing" (T. 47, 48, 95).

In short, if the defendant is to be prosecuted for hindering or interfering with the Act based on the activities alleged in the indictment, the statute and regulation must fall for overbreadth and consequently the conviction under Count V must be reversed.

CONCLUSION

For all of the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted.

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